COURT, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-489

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, *Petitioner*,

*v.*

MARGARET TURNER, AS LEGAL GUARDIAN OF LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS AND MARVAR ADAMS, *Respondents*.

## BRIEF OF THE STATES OF NEVADA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, KENTUCKY, NEBRASKA, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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## INDEX


| | PAGE |
|---|---|
| STATEMENT OF THE CASE | 1 |
| INTEREST OF AMICI CURIAE | 3 |
| ARGUMENT | 4 |
| I. The decision below voiding a state statute as a denial of Equal Protection should be based on applicable decisions of this court | 4 |
| II. Only the legislature may prescribe the conditions on which state may be sued | 7 |
| III. The effect of the decision below renders provision of Nevada Constitution inoperative as contravening the equal protection clause | 9 |
| IV. The decision below needlessly draws into question application of equal protection clause to provision of state Constitution | 12 |
| V. Precedent of the decision below will be counterproductive to the trend of states to waive their immunity from suit | 13 |
| CONCLUSION | 15 |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| *Apfelbacher v. State*, 152 N.W. 144 | 8 |
| *Atchison, T. & S. F. Rwy. Co. v. Matthews*, 174 U.S. 96 | 5 |
| *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 | 7, 13 |
| *Crown Coat Front Co. v. United States*, 386, U.S. 503 | 14 |
| *Deroven v. City of Reno*, 87 Nev. 606, 491 P.2d 989 | 2 |
| *Friedman v. United States*, 310 F.2d 381, cert. denied, 373 U.S. 932 | 6 |
| *Gibson v. Mason*, 5 Nev. 283 | 13 |
| *Hess v. Pegg*, 7 Nev. 23 | 8 |
| *Holytz v. City of Milwaukee*, 115 N.W.2d 618 | 8 |
| *Kendall v. United States*, 107 U.S. 123 | 14 |
| *McAndrews v. Mularchuk*, 162 A.2d 820 | 8 |
| *Missouri Pacific Rwy. v. Austin*, 292 F.2d 415 | 7 |

PAGE

*Muskoph v. Corning Hosp. Dist.*, 11 Cal.Rptr. 89, 359 P.2d 457 ..... 8
*Pierce v. Yakima Valley Mem. Hosp. Assn.*, 260 P.2d 765 ..... 8
*Reich v. State Highway Dept.*, 194 N.W.2d 700 ..... 5, 6, 11
*San Antonio Indep. Sch. Dist. v. Rodriguez*, 93 S.Ct. 1278 ..... 5
*Sun Oil Co. v. Burford*, 130 F.2d 10 ..... 3
*United States v. Sherwood*, 312 U.S. 584 ..... 14
*Vance v. Vance*, 108 U.S. 514 ..... 6
*Whitfield v. Roth*, 107 Cal.Rptr. 207 ..... 11, 12
*Williams v. L. A. Metro. Trans. Auth.*, 440 P.2d 497 ..... 12

CONSTITUTIONS:

Constitution of the United States, Eleventh Amendment ..... 7, 13
Constitution of the United States, Fourteenth Amendment ..... 4
Constitution of Nevada, Art. IV, § 22 ..... 5, 9, 10

STATUTES:

Nevada Revised Statute 41.031 et seq. ..... 1, 8
Nevada Revised Statute 11.250 ..... 7

MISCELLANEOUS:

C.J.S. Vol. 81, States, § 214-a, p. 1304 ..... 7
Jaffee, *Suits against Governments and Officers: Sovereign Immunity*, 77 Har.L.Rev., p. 1 ..... 7, 8, 13
Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Geo.L.Rev., p. 207 ..... 13

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## BRIEF OF THE STATES OF NEVADA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, KENTUCKY, NEBRASKA, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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### STATEMENT OF THE CASE

In 1965, the Nevada Legislature waived Nevada's and its political subdivisions' immunity from suit. Nevada Revised Statute 41.031 et. seq. The Legislature further prescribed that a claimant could not bring suit unless a timely notice of the claim was filed with the State or political subdivision.

Thereafter, the Supreme Court of Nevada consistently upheld these notice of claim requirements and developed a substantial

body of case law dealing with timeliness and substantial compliance with the legislative scheme of waiver of immunity from suit. (See Appendix A, page 28.)

Only eighteen months prior to its decision in *Turner v. Staggs*, 89 Nev. ....., Advance Opinion 78, the Supreme Court of Nevada unanimously upheld, in *Derouen v. City of Reno*, 87 Nev. 606, 491 P.2d 989, that there was no constitutional restriction upon the Legislature's power to restrict a right of action. Against this background, *Turner v. Staggs* came before the Court. The fabric of predictability of the law woven by these prior and recent decisions came apart in *Turner v. Staggs*. The decision in *Turner v. Staggs* is set forth in Appendix A.

The decision of the Supreme Court of Nevada voided as a denial of equal protection Nevada's statutes requiring timely presentment of claim as precondition to suing the state or its political subdivisions.

The State of Nevada was not a party to the proceedings in the Nevada Courts.[1] Consequently, Nevada had no knowledge of the pendency before the Supreme Court of Nevada of the constitutionality of the notice requirements of the claim statutes.

The constitutional challenge did not arise at trial but came up during oral argument on appeal. Indeed, as the State reads the opinion, the Nevada Supreme Court *sua sponte* questioned the constitutionality of the claim statutes. The case was remanded to the District Judge for determining their constitutionality. The District Judge ruled that the Nevada Supreme Court's upholding of the validity of the claims statutes in recent decisions was precedent and obligatory upon him. The Supreme Court thereafter rendered its decision without further oral argument.

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[1]The case was not an action for declaratory judgment challenging the constitutionality of a state statute in which the attorney general is served.

Although not a party, the State of Nevada nonetheless moved the Nevada Supreme Court for leave to file a petition in intervention in the nature of a petition for rehearing.[2] Nevada's motion and Clark County's petition for rehearing were denied.

## INTEREST OF AMICI CURIAE

The State of Nevada is in the uncommon, perhaps unparalled, position of having one of its laws regulating a vital area of the State's relations with its citizens struck down without ever having had an opportunity to present the State's views and arguments on behalf of the people to the Supreme Court of Nevada.

In short, the people of Nevada have been foreclosed access to their own state court of last resort. They now look to the Supreme Court of the United States for the opportunity to be heard as *amicus curiae* on the constitutionality of the notice requirements of the state claims statute.

Another more important interest of Nevada and its thirteen sister states[3] appearing as *amici curiae* is the fundamental question of whether a state legislature may prescribe conditions precedent to suit against the state or its political subdivisions. Underlying this inquiry is the consideration of the court-created rule of governmental immunity from tort liability vis-a-vis the legislatively-created rule of government immunity from suit as they bear on the principle of separation of powers.

The concern of *amici curiae* further extends to the recent trend of more and more state legislatures waiving the state's immunity from suit, and the effect an unbridled decision such as

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[2]Precedent for such a motion is *Sun Oil Co. v. Burford,* 130 F.2d 10, 19, reversed on other grounds. 319 U.S. 315.

[3]Other states have expressed interest in filing briefs on the merits as *amicus curiae* if certiorari is granted.

*Turner v. Staggs* could have thereon. This immunity of the states from suit has now been waived by some eleven States. In so waiving, the legislatures have attached restrictive conditions to be met by a citizen before a cause of action accrues against the state.

The *amici curiae* strongly believe that the accelerated trend of recent waivers of immunity from suit will be slowed, if not reversed altogether, and more likely reinstated by state legislatures, if a State cannot constitutionally classify itself differently for purposes of suit where state treasury liability may be imposed.

Another grave infirmity of the *Turner* decision, and one which the *amici curiae* view with marked apprehension, is the statement of the majority opinion, Appendix A, page 22, that claims statutes serve no beneficial use in our scheme of state government. The implications this view bodes for the separation of powers are, to say the least, disquieting.

## ARGUMENT

### 1.

### THE DECISION BELOW VOIDING A STATE STATUTE AS A DENIAL OF EQUAL PROTECTION SHOULD BE BASED ON APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of Nevada grounds its decision in *Turner v. Staggs* upon a denial of the equal protection of the laws under the Fourteenth Amendment. This basis of the majority's decision raises the more fundamental question of whether a state may, without denying equal protection of the law, classify itself different from its citizens when waiving the state's immunity from suit.

Significantly, the majority proceeds to answer this pervasive

question without citing or reviewing one decision of the Supreme Court of the United States in support of its holding that the statute offends the Equal Protection Clause.

Unquestionably, whenever a court, particularly a state court of last resort, has before it an equal protection challenge to a statute arising under the Constitution of the United States, the court should turn for guidance to the pronouncements of the United States Supreme Court on the constitutional provision in question.

The majority opinion not only does not consider or apply either the test of "strict judicial scrutiny" or "does the statute rationally further some legitimate state interest", *San Antonio Indep. Sch. Dist. v. Rodriguez*, 1278, 1287, 1288 and 1300, the majority opinion does not apply any test or judicial criteria. Instead, the majority relied on two Michigan decisions, culminating in *Reich v. State Highway Dept.*, 194 N.W.2d, 700. The *Reich* case is illustrative of the court abrogating the court-created rule of government immunity from tort liability.

The Constitution of Nevada, as do the constitutions of most states, authorizes the Legislature to provide for suit against the state.[4] The waiver of immunity from suit is to be by law of general application to everyone similarly situated with respect to the state.

The scope of the Equal Protection Clause forbids a legislature to select any person and impose discrimination not cast upon others similarly situated. *Atchison, T. & S. F. Rwy. Co. v. Matthews*, 174 U.S. 96. And it is well settled that a state may classify persons and objects for the purpose of legislation. Mr.

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[4]"Provision may be made by general law for bringing suit against the state as to all liabilities originating after the adoption of this Constitution." Article IV, Section 22.

Justice Stewart, concurring with the majority in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 93 S.Ct. 1278, stated:

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.
>
> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. [Page 1310.]

Nowhere does the majority in *Turner v. Staggs* undertake a review of the reasons for the Legislature's classification of a claimant's right to sue private tort-feasors differently from his right to sue governmental tort-feasors.

Nor does the majority approach the matter from the standpoint of whether the Legislature can prescribe different treatment for the accrual of, and bringing suit upon, a cause of action when the government is the tort-feasor.

Nor does the majority examine whether minors have rights under the United States Constitution different from adult citizens. The Constitution of the United States does not give to minors special rights beyond others. *Vance v. Vance*, 108 U.S. 514, 521. And yet the majority simply concludes that it is a denial of equal protection to treat minors differently from others.

The majority opinion also fails to distinguish between the time when a cause of action accrues against the state and the time within which suit must be brought. This distinction is not academic as it is the timely notice of the claim by which the right to sue accrues, and a cause of action is held to accrue only at the time a suit may be maintained thereon. *Friedman v. United States*, 310 F.2d 381, 385–386, cert. denied, 373 U.S. 932.

Once a cause of action accrues, the period of limitation begins to run. *Missouri Pacific Rwy. v. Austin*, 292 F.2d 415, and the period is tolled by reason of a disability such as minority. Nevada Revised Statute 11.250 provides for tolling of limitation of action during minority.

Thus, for the purpose of when a cause of action accrues against Nevada or its political subdivisions, minors are not treated, nor classified, any differently at all. All citizens of Nevada are in the same class, whether minors or adults.

But assuming, *arguendo*, that the Nevada Legislature has classified minors differently for purposes of accruing the right to sue the state, then the majority should have considered if the classification is so discriminatory or invidious as to deny minors equal protection of the laws. But, instead, the majority concludes that notice of claim requirements constitute a denial of equal protection, not to minors only, but as applied to every potential claimant.

## II.

## ONLY THE LEGISLATURE MAY PRESCRIBE THE CONDITIONS ON WHICH STATE MAY BE SUED.

The provisions of state constitutions authorizing suit against the state recognize a fundamental attribute of a State's sovereignty that it cannot be sued without consent of the state. The doubts expressed in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, as to whether a State of the United States was sovereign so as to enjoy immunity from suit were laid to rest by adoption of the Eleventh Amendment. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Har.L.Rev., pp. 19–20. These constitutional provisions have generally been held not to be self-executing and no suit may be maintained until the legislature provides therefor. 81 C.J.S., States, Section 214-a, p. 1304.

The Nevada Legislature has, by enacting NRS 41.031 et. seq., provided by law for suit against the State and has required the giving of notice of claims by potential suitors. The majority opinion does not share the Legislature's view that the claim statutes are needful and would read into the State Constitution the "Supreme Court may by decision provide for suit against the State." This view of the majority nullifies a power delegated to the Legislature by the people—a power to decide for the people what is best or is wise and expedient policy. An earlier Supreme Court of Nevada observed in *Hess v. Pegg*, 7 Nev. 23, 31, the solution to impolitic or unwise laws lies "in the more careful selection of the members of that branch of state government to which they have . . . . vested the Legislative authority of this state."

To be sure, the majority in *Turner v. Staggs* may have abrogated the notice of claim requirements from a failure to distinguish governmental immunity from tort liability with sovereign immunity from suit although neither doctrine is discussed. The two doctrines are distinct and unrelated. *Apfelbacher v. State*, 152 N.W. 144; *Holytz v. City of Milwaukee*, 115 N.W.2d 618; *Muskoph v. Corning Hosp. Dist.*, 11 Cal.Rptr., 89, 359 P.2d, 457, 460; *Jaffe*, Har.L.Rev. pp. 3–4, *supra*.

The doctrine of governmental immunity from tort liability had its genesis in the court-created doctrine that "the King could do no wrong" and since it was created by the court, it could be abolished by the Court: *Pierce v. Yakima Valley Mem. Hosp. Assn.*, 260 P.2d, 765, *Muskoph v. Corning Hosp. Dist.*, *supra*, *Holytz v. City of Milwaukee*, *supra*, *McAndrews v. Mularchuk*, 162 A.2d 820, 832.

The doctrine of sovereign immunity from suit exists in Nevada

and in most states not as a creation of courts, but as a constitutional principle chosen by the people and subject to change only by amendment adopted by the people.

Acquiescense in the majority's viewpoint that it decides what is beneficial and best serves the people effectively enjoins the Nevada Legislature from discharging its constitutional authority to prescribe by general law for suits against the state. And it would avail the State nothing if the Legislature were again to pass another notice statute as long as the Supreme Court of Nevada persists in the premise that it can prescribe the terms and conditions upon which the State may be sued.

## III.

## THE EFFECT OF THE DECISION BELOW RENDERS PROVISION OF NEVADA CONSTITUTION INOPERATIVE AS CONTRAVENING THE EQUAL PROTECTION CLAUSE.

In waiving sovereign immunity from suit, the Nevada Legislature acted pursuant to constitutional authority to do so set forth in Article IV, Section 22. Consistent with this mandate, the Legislature enacted a general law applicable to everyone having a claim against the State. No exceptions or restrictions pertaining to special or favored persons or classes were enacted or prescribed.

The Legislature did set the State and its political subdivisions apart from private tort-feasors by prescribing procedural steps to be followed precedent to claimants' right to maintain a suit against the State.

One procedural step is the requirement of timely filing a notice of the particulars of a claim with the State or political subdivision.

It is this requirement the majority in *Turner v. Staggs* voided as a denial of equal protection.

Other restrictions on the right to sue the State were imposed by the Legislature such as limiting the liability of the State to $25,000.00 per claimant, prohibiting awards of punitive damages or interest, establishing exceptions to liability when acting in a discretionary capacity or acting pursuant to statute or regulations and others.

The majority's statement in *Turner v. Staggs*, that claims statutes serve no beneficial use within the scheme of state government is at war with the keystone of representative government in America, i.e., the principle of separation of powers. The statement, if left standing, nullifies Section 22 of Article IV of the Nevada Constitution and serves as precedent for nullification of similar constitutional provisions of other states providing that the Legislature may authorize suit against the State.

If the majority is correct in its holding that one restriction is a denial of equal protection because claimants having claims against private tort-feasors are not similarly restricted, then it is a short step to voiding all conditions precedent which the Legislature deemed necessary to protect the State against financial irresponsibility of unlimited suit against the State. *Turner v. Staggs* sets the stage upon which courts will soon act to invalidate the Legislature's constitutional perogative of providing for suit.

There can be no doubt that Section 22, Article IV, of the Constitution of Nevada has been negated effectively as though it were excised and transferred to the Article enumerating the powers of the judicial department.

Thus, it is the will of the people, not merely as expressed in statute, but as expressed in the organic document of Nevada government, its Constitution, that is set aside.

Whenever a state court boldly assumes the legislative power of deciding the wisdom or expediency of legislation then review by *certiorari* is the only available means of preserving the powers of each of the three branches of government in some semblance of equilibrium. The *amici curiae* earnestly submit that this is a case for review by *certiorari*.

As Justice Brennan, dissenting in *Reich v. State Highway Dept.*, 194 N.W.2d, 700, *supra*, prophetically observed:

> The process of judicial repeal of legislative enactments set in motion with this decision will run as far as judicial caprice will carry it. It will now be the fashion for judges to throw out all differentials in statutes of limitations. * * * There is no limitation, it seems, to the ingenuity of judges who disagree with the legislature. What a pity that the American experiment in self-government has in 200 years fallen upon such bad times. [Page 703.]

Indeed, the *Reich* decision, aside from its being embraced in *Turner v. Staggs*, has been cited by another jurisdiction, *Whitfield v. Roth*, 107 Cal.Rptr. 207. There, the Court heeded Justice Brennan's admonition, saying:

> On the other hand, there is a good deal to be said for the proposition that judicial repeal of legislation through the elastic expedient of the constitutional concept of equal protection of the laws is hazardous. While the executive and legislative branches are directly answerable to the electorate and are thereby prevented from ignoring the doctrine of separation of powers, the judicial branch, particularly at the appellate level, is generally not so restricted. Therefore, the full vitality of the doctrine, as envisaged by the founding fathers, is, to a very great extent, dependent upon the scrupulous and conscientious self-imposed discipline of *judicial restraint*. [See *Reich v. State Highway Dept.*, *supra*, 194 N.W.2d 700, p. 703, dissenting opinion of Brennan, J.]

## IV.

## THE DECISION BELOW NEEDLESSLY DRAWS INTO QUESTION APPLICATION OF EQUAL PROTECTION CLAUSE TO PROVISION OF STATE CONSTITUTION

The decision in *Turner v. Staggs* exceeds the bounds of judicial restraint which *Whitfield v. Roth, supra*, so aptly discerned and stayed within. The majority states that it could dispose of the case on the grounds rights of a minor were involved and would excuse compliance with the notice requirement. Appendix A, page 25. The Supeme Court of California did stop at this juncture in *Williams v. L.A. Metropolitan Trans. Auth.*, 440 P.2d 497, when it held the six months' limitation period after rejection of a claim was tolled during minority.

However, the Nevada Supreme Court chose not to decide the case on these grounds, but went far beyond the necessities of the case. In so doing, the majority opinion fell into the unaccustomed, and certainly unserving, role of legislating. One is hard put to conclude other than its straying beyond these limits was not inadvertent.

It is also apparent that the majority opinion in *Turner v. Staggs* is an abrupt departure from the historic posture and treatment of constitutional issues by an appellate court.

As noted, the State was not a party to the proceedings, and the question of constitutionality under the equal protection clause was raised by the Court itself. Secondly, after the Court stated it could decide the appeal on more narrow grounds, i.e., the involvement of minor's rights, the Court proceeded anyway to decide the equal protection question.

Next, it did not decide whether minors were denied equal protection but decided all persons, without classification, were

denied equal protection. And finally, the Court voided the statutes without resort whatsoever to the pronouncements of the Supreme Court of the United States in securing the guarantees of equal protection.

Moreover, the majority abandoned decisions of the Supreme Court of Nevada which for one hundred years continually hewed to the mold of *Gibson v. Mason*, 5 Nev. 283–294–295, holding the power to legislate necessarily carried with it the right to determine expediency, wisdom and justice of law, and courts have no power to annul or set aside a statute because of considerations of natural justice, wisdom or expediency.

## V.

## PRECEDENT OF THE DECISION BELOW WILL BE COUNTER-PRODUCTIVE TO THE TREND OF STATES TO WAIVE THEIR IMMUNITY FROM SUIT.

Each state enjoys immunity from suit except that portion delegated to the national government, and partly returned to it by the Eleventh Amendment.

Some Courts, beginning with *Chisholm v. Georgia, supra*, legal writers, and journals, have criticized the doctrine of state immunity from suit as incompatible with popular sovereignty vis-a-vis a regal sovereignty. Some authorities have questioned whether the doctrine ever really existed at common law except in name only.[5]

These criticisms aside however, the doctrine of state immunity from suit has enjoyed a viable existence in the United States.

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[5]Jaffe, *Suits Against Governments And Officers: Sovereign Immunity*, 77 Har. L. Rev. 1; Mathis, *The Eleventh Amendment: Adoption and Interpretation*. 2 Georgia L. Rev. p. 207–209.

Although in recent times, many state Legislatures have enacted statutes pursuant to state constitution waiving immunity from suit. These waivers are generally conditioned upon measures deemed by the Legislature necessary to limit liability and unlimited financial drain on the state treasury. It cannot be seriously maintained that it is not the perogrative of the Legislature to impose restrictions upon the right to sue the state.

It is well settled that the United States is ordinarily immune from suit and that there is no question of the power of Congress to define the limits of its waiver of sovereign immunity. *Kendall v. United States*, 107 U.S. 123; *United States v. Sherwood*, 312 U.S. 584. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 520.

A decision as the one in question which strips the Legislature of its constitutional perogative on an undemonstrated conflict with the United States Constitution can only be regarded with grave misgivings by those mindful of the delicate balance of powers among the three branches of government.

There can be little doubt that *Turner v. Staggs*, left unchecked, and its progeny sure to follow, will give those states which have not waived their immunity ample reason to pause and reflect upon the consequences of doing so. Prospects of the state treasury being held in no more regard than the pocketbook of any of its citizens is chilling indeed to those states which have conditionally permitted suit. It would not be surprising to find these states taking another look at their previously-supposed enlightened approach of allowing their citizens a remedy, albeit a limited one, when wronged by the state.

## CONCLUSION

For the foregoing reasons, we respectfully submit this is a case most providently suited for review by this Court and the petition for *certiorari* should be granted.

Respectfully submitted,

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## APPENDIX A

**89 Nev., Advance Opinion 78**

# IN THE SUPEME COURT OF THE STATE OF NEVADA

MARGARET TURNER, AS LEGAL GUARDIAN OF LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS AND MARVAR ADAMS, APPELLANT, *v.* JACK STAGGS, DR. H. Q. ADAMS AND CLARK COUNTY, RESPONDENTS.

**No. 6770**

June 6, 1973

Appeal from summary judgment, judgment of dismissal and judgment entered pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, and Howard W. Babcock, Judges.

**Affirmed in part; reversed and remanded in part.**

THOMPSON, C. J., and MOWBRAY, J., dissented in part.

*Charles L. Kellar,* of Las Vegas, for Appellant.

*Beckley, DeLanoy & Jemison,* of Las Vegas, for Respondents Jack Staggs and Clark County.

*James F. Pico,* of Las Vegas, for Respondent Dr. H. Q. Adams.

## OPINION

By the Court, BATJER, J.:

On October 1, 1966, Barbara Adams was admitted to the Southern Nevada Memorial Hospital with a chronic kidney infection and hypertensive cardiovascular disease, and she was discharged on October 14, 1966. She was readmitted and again discharged November 14, 1966, with the understanding that she would be transferred to Los Angeles, California, for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. James Y. Clarke, M.D.,

who performed the postmortem examination, diagnosed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance.

A claim was filed on behalf of the minor children of Barbara Adams with the Board of County Commissioners of Clark County, Nevada, on November 2, 1967. After rejection of the claim a complaint was filed on December 21, 1967, by Margaret Turner, as legal guardian for the minors[1] against the Clark County Board of Commissioners, Southern Nevada Memorial Hospital,[2] Jack Staggs, Administrator thereof, Clark County and Dr. H. Q. Adams, for the wrongful death of Barbara Adams.

The cause of action against the board of county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970, and no appeal has been taken from that judgment. The complaint against Clark County was dismissed on motion for summary judgment on August 6, 1971, for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[3] See also, NRS 41.031 and NRS

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[1]In her answer to interrogatories subscribed and sworn to on February 23, 1968, and filed in this action on February 25, 1968, Margaret Turner alleges that she was appointed the legal guardian of the minors by the Eighth Judicial District Court; however, this court finds nothing in the record before it to verify that allegation.

[2]This court has held that county hospitals, established pursuant to statutory authority [NRS 450. et seq.], are without legal entity, and thus not subject to suit for tort. Bloom v. So. Nev. Hospital, 70 Nev. 533, 275 P.2d 885 (1954); McKay v. Washoe General Hospital, 55 Nev. 336, 33 P.2d 755 (1934). Thus, the dismissal of Southern Nevada Memorial Hospital from the suit appears to have been mandated by this court's prior decisions.

[3]NRS 244.245: "1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

"2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand."

NRS 244.250: "1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

"2. No claim or account against any county shall be audited, allowed

41.036. On August 25, 1971, the complaint against Jack Staggs was dismissed pursuant to NRCP 41(b). A trial was held on the alleged malpractice of Dr. H. Q. Adams and the jury returned a defense verdict.

In this appeal it is contended that the district court erred (1) in granting summary judgment in favor of Clark County and its hospital; (2) in dismissing the complaint against Jack Staggs as administrator of Southern Nevada Memorial Hospital;[4] and (3) in giving certain instructions to the jury.

1. We cannot consider issues 2 and 3 because we have not been favored with a transcript of the proceedings in the district court, nor has the appellant submitted a settled and approved statement of the evidence or proceedings. NRCP 75(n).

2. We direct our attention to the summary judgment. The claim against Clark County was not filed until 13 months had elapsed after the death of Barbara Adams. NRS 244.250 requires that a claim against a county must be filed within 6 months after a cause of action arises.

In Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), this court held that the timely filing of a claim was a condition precedent to the commencement of an action against a county. *Barney* relied upon the reasoning in Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942). Artukovich in turn relied in part on the principle that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission. In 1965 the State of Nevada, acting through its legislature, waived its immunity from liability and action and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations. Stats. of Nev., 1965, ch. 505, p. 1413, codified as NRS 41.031. Furthermore the enactment placed all political subdivisions in a similar position. NRS 41.031.[5]

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or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with."

[4]In Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), this court held that a county is the party legally responsible for the obligations of a county hospital. Under the doctrine of respondeat superior, it would appear that dismissal of the complaint against Jack Staggs, Administrator of the Southern Nevada Memorial Hospital, was proper.

[5]NRS 41.031: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions

The requirement of giving notice presupposes the existence of an individual capable of giving it. McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972). To hold otherwise would be to disregard reality. Cf. Walgreen Co. v. Industrial Commission, 153 N.E. 831 (Ill. 1926); Lineberry v. Town of Mebane, 13 S.E.2d 429 (N.C. 1941). NRS 244.245 contains no provision for the filing of a claim by anyone other than the claimant. At the time of their mother's death the minor children were between the ages of 5 and 13 years. In many jurisdictions children of tender years, because they are powerless to act, have been excused from compliance with notice provisions. Simpson v. City of Abilene, 388 S.W.2d 760 (Tex.Civ. App. 1965), (7 years old). See also, City of Barnesville v. Powell, 183 S.E.2d 55 (Ga.App. 1971), (4 years old); McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918), (7 years old); Lazich v. Belanger, 105 P.2d 738 (Mont. 1940), (7 years old); Murphy v. Village of Ft. Edward, 107 N.E. 716 (N.Y. 1915), (5 years old); Webster v. City of Charlotte, 22 S.E.2d 900 (N.C. 1942), (8 years old); 18 E. McQuillin, The Law of Municipal Corporations § 53.159 (3rd rev. ed. 1963).

We could conclude that minority alone will excuse compliance with the notice requirements of NRS 244.245 and NRS 244.250 (City of Houston v. Bergstrom, 468 S.W.2d 588 (Tex.Civ.App. 1971); McCrary v. City of Odessa, supra; Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970)) and dispose of this case upon the ground that the notice requirements of our claim statutes violate the rights of these minors to due process guaranteed by the Fourteenth Amendment of the United States Constitution. However, we believe that the notice of claim requirements found in NRS 244.245

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against individuals and corporations, except as otherwise proved in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. *The State* of Nevada further *waives the immunity from liability and action of all political subdivisions of the state,* and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.036, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. *An action may be brought* under this section *against* the State of Nevada, any agency of the state, or *any political subdivision of the state.* In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state." [Emphasis added.]

and NRS 244.250 as applied to governmental torts deny equal protection guaranteed by the United States Constitution.[6]

Within our present scheme of government, claim statutes serve no real beneficial use (Grubaugh v. City of St. Johns, supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow *Barney*, the minor's cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit. Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law.

The court in *Artukovich* claims to have been following the "great weight of authority," and that may have been true in 1942, but since then, many jurisdictions have limited or abandoned the doctrine of sovereign immunity, either by legislative enactments or judicial decisions. Likewise, claim statutes have been found to violate the equal protection provision of the Fourteenth Amendment of the United States Constitution and have been declared unconstitutional. Reich v. State Highway Department, 194 N.W.2d 700 (Mich. 1972); Friedman v. Farmington Township School District, 198 N.W.2d 785 (Mich.App. 1972); Crook v. Patterson, 201 N.W.2d 676 (Mich.App. 1972).

The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of NRS 244.245 and NRS 244.250 have the effect of arbitrarily dividing all tort-feasors into classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed.

In Reich v. State Highway Dept., supra, the Michigan Supreme Court said: "This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary

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[6]The question of constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. After the question was urged in oral argument we remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, supra, need be reviewed as to that point. We deem otherwise.

and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

"Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses; victims of governmental negligence who must meet requirement, and victims of private negligence who are subject to no such requirement." 194 N.W.2d at 702.

Contrary to the mandate of Art. 8, § 5 of the Nevada Constitution[7] and the intention of the legislature to place victims of negligent conduct on equal footing (NRS 41.031), failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar.

Such arbitrary treatment clearly violates the equal protection guarantees of the United States Constitution. See Art. 1, § 2, Nevada Constitution.

The statutory provisions of this state which provide that no person shall sue a governmental entity of this state for a demand arising out of governmental tort unless they first present a claim within 6 months from the time such tort occurred are void and of no effect.

The judgment of the district court dismissing the complaint against Clark County is reversed and the cause is remanded for further proceedings.

The judgment dismissing the complaint against Jack Staggs and the judgment entered in favor of H. Q. Adams, pursuant to a jury verdict, are affirmed.

GUNDERSON, J., concurs.

ZENOFF, J., concurring:

I agree with Justices Batjer and Gunderson that the questioned statute is unconstitutional. I add, however, my additional thoughts for I believe that we can consider this case and reach the same result for the further reasons stated. For the

[7]In Lincoln County v. Luning, 133 U.S. 529, 531 (1890), the High Court, specifically referring to Art. 8, § 5, of the Nevada Constitution, held: "[T]hat this section is not to be limited to private corporations is evident not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named."

purpose of these stated reasons I respectfully recite the facts in my own manner in order to provide the posture which will be explained.

A complaint was filed December 21, 1967 against the Clark County Commissioners, Southern Nevada Memorial Hospital, Jack Staggs, Administrator thereof, and Dr. H. Q. Adams, for the wrongful death of one Barbara Adams, mother of the real minor plaintiffs by their legal guardian.

Barbara Adams was admitted to the hospital on October 1, 1966 with chronic kidney infection and hypertensive cardiovascular disease; she was discharged on October 14, 1966. A second time she was admitted; she was discharged November 14, 1966 in an improved condition with the understanding that she would be transferred to Los Angeles for further treatment. Three days later she became ill and died while being transported by ambulance to the hospital. The postmortem examination by Dr. Clarke attributed the immediate cause of death to be pulmonary edema and congestion due to probable acute renal insufficiency with uremia and electrolyte imbalance. Barbara was pronounced dead on arrival at the hospital on November 17, 1966.

A claim was filed on behalf of the minor children of Barbara with the appropriate county board on November 2, 1967. After rejection, a civil action against the respondents and others was commenced on December 21, 1967.

The claim against the county commissioners in their individual capacity was dismissed by summary judgment dated January 13, 1970 and the action against Clark County was dismissed on motion for summary judgment on August 6, 1971 for failure to present a timely claim pursuant to NRS 244.245 and NRS 244.250.[1] On August 25, 1971, a dismissal pursuant to NRCP 41(b) was entered as to Jack Staggs. A trial was had

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[1]244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county

as to the alleged malpractice of Dr. H. Q. Adams wherein the jury returned a defense verdict.

Three main issues were raised for my consideration.[2]

1. Did the court err in granting summary judgment as to Clark County and its hospital?

2. Did the court err in dismissing the claim against Jack Staggs as Administrator of Nevada Southern Memorial Hospital?

3. Did the court err in giving certain instructions to the jury?

We have no transcript presented to us, thus I cannot consider Issues 2 and 3. The central issue now is directed to the first point.

1. I glean from this record that the deceased was black, sick and impoverished when she died leaving three children in their early minority. The claim against the county and the hospital was not filed for 13 months after her death. NRS 244.250 requires that a claim against a county must be filed within 6 months and under Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964), a claim must be filed as a condition precedent to the commencement of an action against the county. That case was founded upon Artukovich v. Astendorf, 131 P.2d 831 (Cal. 1942), which marked by a spirited division of the California Supreme Court (4–3) affirmed the established weight of authority that an action against a public entity cannot be filed even by a minor unless the claim statute, if there be one, is first observed.

This case, however, poses a different problem. A claim was filed but not within the statutory 6 months. No reason is given

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auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.

244.250 Unaudited claims to be presented within 6 months.

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

[2]The question of the constitutionality of the claim statute was not properly raised before this court, and had not been ruled upon below. We therefore remanded the case to the trial court for a decision on that issue. The briefs filed on remand did not convince the lower court that Barney v. County of Clark, infra, need be reviewed as to that point.

for the failure to file within the statutory period. It is, however, contended that the statutory 6-month period was tolled during the children's minority by reason of NRS 11.250 which provides that if a person is entitled to bring an action other than for the recovery of real property, the time within which the cause of action must be commenced is tolled if that person is within the age of 21 years. This court has adopted the rule expressed in Artukovich v. Astendorf, supra, and I therefore feel compelled to maintain the continuity established by the respected Supreme Court of California. That court later established, in Williams v. Los Angeles Metropolitan Transit Auth., 440 P.2d 497 (Cal. 1968), that where the filing of a claim in advance of suit is required, that requirement is suspended during the period of minority if the action is "mentioned" in the limitation statute as one the person could bring. It is so mentioned in Nevada's statutes, NRS 41.036(3)[3] and NRS 11.190(5)(b).[4]

In Williams v. Los Angeles Metropolitan Transit Auth., supra, the plaintiff filed the required claim within the prescribed time but failed to file his action against the public entity within the 6 months required after rejection of the claim. I accept, by analogy, the holding in Williams v. Los Angeles Metropolitan Transit Auth., supra, since California's tolling statute during minority is the same as ours.

2. I am not disturbed by the language of Barney v. County of Clark, supra, which emphasizes *timely* filing since the question

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[3]41.036(3):

3. Every claim against any other political subdivision of the state shall be presented, within 6 months from the time the cause of action accrues, to the governing body of that political subdivision. No action may be brought unless the governing body refuses to approve or fails within 90 days to act upon the claim.

[4]11.190(5)(b): Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

of timeliness was not an issue in that case any more than in Kelleher v. Ephrata School District, 355 P.2d 989 (Wash. 1960), cited therein. The point involved in both cases was whether a claim must be filed at all. Timeliness was not the question.

3. Nor am I concerned with the fine-line distinction of whether the claim statute is a statute of limitation or a procedural roadblock as a condition precedent to suit. That question was considered in Myers v. Stevenson, 270 P.2d 885, 889 (Cal. App. 1954), and discarded as not being controlling as to the merits of the case. The trend is to construe statutes in such manner as to effectuate the long-recognized principle that children are to be protected during their minority from the destruction of their rights by the running of the statutes of limitation. Williams v. Los Angeles Metropolitan Transit Auth., supra; Los Angeles City School District v. Superior Court, 88 Cal.Rptr. 286 (Cal. App. 1970). The majority will argue that the Williams case, supra, does not apply, that there is a difference between a statute of limitation and a condition precedent to suit. The minors here are entitled to the benefits of the tolling statute. Whether the claim statute be called a statute of limitations or a condition precedent is of no moment. A review of other authorities reflects the foretold positive trend against the rigidity of the claim statutes, particularly as they affect the rights of minors.

THOMPSON, C. J., with whom MOWBRAY, J., agrees, dissenting in part:

I would affirm the summary judgment for Clark County and, therefore, dissent from that aspect of the Court's opinion.

1. The timely filing of claims with the Board of County Commissioners is a precondition to the existence of a cause of action against the County. Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964). The minority of the children of the decedent does not excuse noncompliance nor extend the time for compliance, since proper claims could have been timely filed by their legal representative. Although it is true that the period of disability of a minor shall not be part of the time limited for the commencement of an action, NRS 11.250; Parker v. Chrysler Motors Corp., 88 Nev. 560, 502 P.2d 111 (1972), that provision applies only when considering the affirmative defense of the statute of limitations, and does not bear upon the duty of minor claimants through their legal representative, to timely file their claims as a condition precedent to the existence of a cause of

action. As noted in Barney v. County of Clark, supra, "[w]e are not concerned therefore with a statute in the nature of a statute of limitations; rather we are concerned with the performance of a necessary condition precedent to suit." Id. at 106.

2. The majority opinion voids all statutes precluding suit against a governmental entity for any tort demand unless a claim is first presented. This sweeping declaration nullified NRS 41.036, NRS 244.245 to 244.255, NRS 268.020 and, perhaps, others. Barney v. County of Clark, supra, and Hart v. City of Las Vegas, 73 Nev. 29, 307 P.2d 617 (1957), are silently overruled. Moreover, it renders meaningless, so far as a claim statute is concerned, a substantial body of case law dealing with timeliness and substantial compliance with the intendment of the statute. Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971); Kaminski v. Woodbury, 85 Nev. 667, 462 P.2d 45 (1969); City of Boulder City v. Miles, 85 Nev. 46, 449 P.2d 1003 (1969); Rogers v. State, 85 Nev. 361, 445 P.2d 172 (1969); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952), and Las Vegas v. Schultz, 59 Nev. 1, 83 P.2d 1040 (1938). These cases preserved the integrity of the legislative scheme and at the same time honored the rights of claimants who had met the underlying purposes of the statute. Their rights were not denied for technical or insubstantial reasons. Whenever a sensible explanation was offered for failing to comply with a claim statute requirement, that explanation was accepted.

It is not per se bad for a court to set aside statutes and ignore case precedent. It is, however, conduct calling for extreme caution. Solid reasons must exist. I perceive no such reasons in the matter at hand. The majority of this Court find that claim statutes violate the command of the Equal Protection Clause of the Federal Constitution. With due deference, I suggest that the Equal Protection Clause does not bear upon the matter.

The legislature has a wide discretion to enact laws which affect some groups of citizens differently than others. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. United States, 366 U.S. 420 (1961). The purpose of a claim statute is to enable the governmental agency to make an early investigation of the claim, of the claimant, and to marshal evidence promptly at a time when it is possible to do so. City of Reno v. Fields, 69 Nev. 300, 250 P.2d 140 (1952); Brown v. Board of Trustees,

Etc., 104 N.E.2d 866 (N.Y. 1952). This purpose surely is reasonable and not an arbitrary exercise of legislative power. I cannot find it to be irrational nonsense.

All persons injured through the negligence of the state or its political subdivisions have been granted the right to bring suit (except where immunity is retained) and this right is granted equally and without discrimination on any basis whatsoever. NRS 41.031; State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970). This is equality under the same conditions and among persons similarly situated. Boyne v. State ex rel. Dickerson, 80 Nev. 160, 390 P.2d 225 (1964). And, contrary to the view of the majority, the Equal Protection Clause does not require equal treatment of private persons and the State. Tustin Heights Ass'n. v. Board of Supervisors, 339 P.2d 914 (Cal.App. 1959). This is the thrust of Derouen v. City of Reno, 87 Nev. 606, 491 P.2d 989 (1971), where we upheld a city claim statute against the contention that a city should not be treated differently than a private corporation. It also is the teaching of State v. Silva, supra, where we held that the State could limit recovery to $25,000 for each claimant without violating the concept of equal protection. Are these recent decisions no longer viable? Have they also been cast aside sub silentio? If it is constitutionally permissible for the State to limit recovery (State v. Silva, supra) how can it be constitutionally impermissible for the State to require that a claim be filed?

As I read the majority opinion it voids the claim statutes insofar as they apply to governmental torts. Are these statutes still operative otherwise? This wholesale slaughter of a complete statutory scheme and of case precedent, both old and recent, is conduct unsuited to the function of this Court. Respectfully, I dissent.